

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 27**

AMPCO SYSTEM PARKING

Employer,

and

Case 27-RC-8438

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 961

Petitioner.

**DECISION AND DIRECTION OF ELECTION**

On March 22, 2006<sup>1</sup>, the International Brotherhood of Teamsters, Local 961, (Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act, as amended, (the Act), seeking an election among all Assistant Managers on Duty (AMODs) employed by AMPCO System Parking, (Employer), at its facility located at the Denver International Airport in Denver, Colorado. On April 3, a hearing was held before Hearing Officer Ian Farrell. Following the close of the hearing the parties filed post-hearing briefs.<sup>2</sup>

This case presents two issues related to the status of the AMODs who are the subject of this petition. The first issue is whether the AMODs are supervisors within the meaning of Section 2(11) of the Act. The second issue is whether the AMODs are confidential employees. The Employer contends that the AMODs

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<sup>1</sup> All dates are 2006 unless otherwise noted.

<sup>2</sup> At the conclusion of the hearing the Hearing Officer set the date for the receipt of briefs as April 10. Upon written request, time within which to file briefs was extended to the close of business Friday April 14. The Petitioner filed its brief on April 13. The Employer's brief was not received in the regional office

are statutory supervisors and/or confidential employees and that this petition should be dismissed. The Petitioner maintains that the AMODs are employees and that an immediate election should be ordered in this case. There is no collective bargaining history among the AMODs. No party has taken the position that the AMODs are not an appropriate bargaining unit if they are neither supervisors nor confidential employees.

For the reasons discussed below I find that the Employer has failed to meet its burden and failed to establish that the AMODs are either supervisors or confidential employees within the meaning of the Act and existing Board law. In view my conclusion I shall direct an immediate election in the petitioned-for unit of approximately 12 AMODs.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the parties stipulated, and I find, that the Employer is a Delaware corporation, with its principal place of business in Denver, Colorado. The Employer has stipulated that in the course and conduct of its business operations, it annually derives gross revenues in excess of \$500,000 and provides services valued in excess of \$50,000 directly to

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until April 17. Pursuant to Section 102.111(b) of the Board's Rules and Regulations, the Employer's brief is rejected as untimely filed and it has not been considered.

other enterprises within the State of Colorado, including Denver International Airport, which are directly engaged in interstate commerce.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purpose of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:

**INCLUDED:** All Assistant Managers on Duty;

**EXCLUDED:** All office clerical employees, managerial employees, bus drivers, bus attendants, lot supervisors, guards and supervisors as defined in the Act.

### **STATEMENT OF THE CASE**

The Employer currently has a contract with the City and County of Denver to operate the shuttle bus service at Denver International Airport (DIA) transporting people between the airport terminals and the outlying parking lots, primarily the Mount Elbert and Pikes Peak lots. In addition, when requested to do so the Employer also provides shuttle buses for special events for the City and County of Denver. The Employer has a base operation located on 78<sup>th</sup> Avenue, a small distance from the airport.

The Employer has several managers overseeing the operation of its shuttle services at DIA. The highest ranking on-site manager is Wayne McDonald, the General Manager. Kerrie Bathje, the Assistant General Manager,

reports directly to the General Manager and assists him with the overall operation at DIA including administration, client contact and operations. Ms. Bathje is directly responsible for overseeing the Employer's human resource functions including hiring, discipline, and contract administration. The General Manager and Assistant General Manager are the only salaried employees.

Reporting directly to Ms. Bathje are approximately 5 Managers on Duty (MODs). Ms. Bathje testified that a MOD has the power to write up schedules for AMODs, lot supervisors and drivers, has authority to discipline any employee without having to seek approval from anyone else and has authority to adjust grievances for employees covered by collective bargaining agreements up to the Step 2 level of the grievance procedure. The Employer asserts that MODs are statutory supervisors within the meaning of Section 2(11) of the Act. The Petitioner takes the position that it has never seen a job description for the MOD position and consequently cannot stipulate that they possess sufficient authority to constitute Section 2(11) supervisors. Based on the record evidence, it appears that MODs possess the authority to suspend employees, adjust grievances at the first step of the grievance procedure, issue discipline and effectively recommend termination. Therefore I find that MODs are statutory supervisors within the meaning of Section 2(11) of the Act.

The Assistant Managers on Duty (AMODs), the classification at issue in this proceeding, report directly to the MODs. Their duties and authority will be discussed in detail below. The Employer also employs lot supervisors. The lot supervisors are stationed in the parking lots and are responsible for making sure

that the shuttle buses operate properly and generally stay on schedule in the parking lots. According to the record, lot supervisors are not statutory supervisors and are represented for purposes of collective bargaining by the Petitioner. The Employer also employs bus drivers who operate the shuttle buses between the terminal and the parking lots. The Employer also apparently employs bus attendants who work on the shuttle buses<sup>3</sup>. The bus drivers and bus attendants are represented for purposes of collective bargaining by the United Mine Workers of America, Local 8431(UMW).

The Employer operates three shifts at DIA, a day shift, an evening shift and a graveyard shift. Although the number of employees assigned to work on each shift varies, approximately one MOD works per shift with two to three AMODs and two to three lot supervisors. There are approximately 39 bus drivers working the day shift, 46 working the swing shift and about 25 working the graveyard shift. The record does not disclose how many bus attendants work per shift.

Except for the General Manager and the Assistant General Manager, all employees working at the Employer's DIA operation are hourly paid. According to the record, bus drivers earn \$12.72 per hour, lot supervisors earn \$14.35 per hour and AMODs earn \$14.50 per hour<sup>4</sup>. The record is silent with respect to the hourly rate of the MODs. The bus drivers, attendants and lot supervisors are eligible for employee benefits consistent with the terms of the specific collective

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<sup>3</sup> Although witness testimony occasionally refers to bus attendants, the record is silent with respect to their duties or working conditions.

<sup>4</sup> I note that AMODs earn only 15 cents per hour more than lot supervisors who the Employer agrees are employees and not statutory supervisors.

bargaining agreement covering each classification. The record does not establish whether these same fringe benefits are available to unrepresented employees including the AMODS.

Several witnesses testified about the duties performed by AMODs. AMODs are stationed at several locations. If there are three AMODs working on a shift, one is assigned to the Employer's 78<sup>th</sup> Avenue facility to monitor the GPS system and two are apparently assigned to locations on level 5 at DIA on the east and west side of the terminal, which is the passenger drop-off level for the shuttle buses. The AMODs ensure that the buses arrive and depart the terminal on time and do not spend an inordinate amount of time parked at the end of the terminal in a holding area. AMODs can transfer a driver from a route servicing one parking lot to a route servicing another parking lot. If the AMOD sees passengers at the terminal waiting over ten minutes, the AMODs can decide on their own to re-route a shuttle bus to service these passengers and maintain customer service. AMODs may also reschedule break times for drivers and lot supervisors if customers are waiting to be picked up. The lot supervisors control shuttle bus traffic flow in the parking lots. All of the employees including AMODs come to the main office to clock in and get briefings and location assignments from the MOD. AMODs take their lunches and breaks at the Employer's main office in a community break room with other employees.

The Employer's primary witness, Assistant General Manager Bathje, testified in a conclusory manner that AMODs "supervise" the bus drivers and attendants. She essentially testified that their supervisory duties included

responsibly directing work, evaluating employees, effectively recommending employees for hire, discipline, bonuses or retention at the end of a probationary period, conducting investigations, certifying drivers after training and substituting for MODs.

Ms. Bathje testified that AMODs ride along on shuttle buses to observe how drivers deal with passengers and are expected to enforce the Employer's policies "as they see fit." She testified that AMODs may send a shuttle driver back to the base and out of service if necessary although there is no testimony establishing that a AMOD have ever done so or the circumstances under which they are authorized to do so. Ms. Bathje also testified that generally AMODs may issue discipline for behavior such as driving erratically or talking on a cell phone. There is evidence in the record that one AMOD has filled out forms titled "employee corrective action notice" that were apparently included in employees' personnel files. However, both Employer witness Muharrem Ogez who was a AMOD for two years until his November, 2005 promotion to MOD, and Petitioner's witness Cengiz Saribal, presently a AMOD, testified that when AMODs see a problem with a driver they either discuss the problem with the driver or write up a corrective action notice about the incident and refer it to a MOD. With respect to these corrective action notices, Mr. Ogez testified: that a AMOD fills out the top half of the form and the MOD signs on the line set aside for the manager's signature; he has only seen a AMOD's signature on the witness line of the form and never on the manager's line; and the corrective action form does not become official until the MOD signs it.

With respect to evaluating employees, Ms. Bathje testified that AMODs write evaluations for shuttle bus drivers based on their own observations. However, the record evidence establishes that AMODS have not completed any evaluation forms since about October 2005. Ms. Bathje testified that evaluations may result in the driver receiving a bonus or if there are negative comments Ms. Bathje or the training committee can decide that the driver needs to be retrained or that further follow-up is required. The evaluation forms are standardized forms that are essentially checklists for certain basic driving functions such as using both hands on the steering wheel.

With respect to AMODs participating in the hiring process, Ms. Bathje gave somewhat contradictory testimony. She testified that AMODs are not now directly involved in the interview process; however, she also testified that if a AMOD is familiar with an applicant, she seeks the AMOD's recommendation before deciding whether to hire the applicant. She also testified that the Employer also plans to involve AMODs in the hiring process in the future.

Ms. Bathje also gave conclusory testimony that AMODs train new employees, certify their training and effectively recommend their retention or non-retention at the end of their probationary period. However, there is no additional evidence establishing the process by which AMODs train employees or make retention recommendations or that any recommendation by the AMOD is in fact followed. Moreover, the record establishes that while a AMOD may be involved in training, the AMOD does not certify that an employee has been trained.



Ms. Bathje also testified that, at the request of supervisors, AMODs conduct investigations that require them to interview witnesses. However, she also acknowledged that the Employer often provides the AMOD with a written series of questions to utilize during these investigations. Ms. Bathje testified about one specific investigation that a AMOD apparently conducted on the graveyard shift. As part of that investigation, the AMOD made factual recommendations to management on what occurred during the incident and described a witness' body language. Ms. Bathje testified that she followed those recommendations. She also made a point of stating that lot supervisors, while they may give a statement about an incident that occurs in the parking lots, are not utilized to conduct investigations in the same manner that AMODs are utilized.

With respect to adjusting grievances, the collective bargaining agreement covering bus drivers and attendants contains a grievance procedure. Step 1 of this grievance procedure is a verbal step. According to Ms. Bathje, a AMOD can adjust grievances at that step and, from time to time the Employer will seek out a AMOD's recommendation at the second step and follow it. However, her testimony on this issue lacked specifics and Mr. Ogez and Mr. Saribal both testified that they were never involved in grievance meetings as AMODs and in Mr. Ogez' case he was never involved in those meetings when he acted as a MOD.

Ms. Bathje also testified that AMODs substitute for MODs when the MODs are attending a meeting, on vacation or otherwise absent from work. Mr. Ogez testified that when he was a AMOD he substituted for a MOD approximately once

a month, when a MOD was in a meeting or called off for the day. Ms. Bahtje also testified in a conclusory manner that when acting as a MOD, AMODs possess all of the supervisory authority of a MOD, including the authority to suspend an employee, although she admitted that such a suspension has never occurred. Ms. Bathje also testified that AMODs acting as MODs have authority to adjust grievances with the Petitioner relating to lot supervisors. However, again there is no evidence that a AMOD had ever adjusted grievances under those circumstances and Mr. Ogez testified that he had never adjusted a grievance while acting as a MOD. AMOD Saribal testified that when he filled in as a MOD for the first time about 10 days before the hearing in this case, he was instructed that if a major incident occurred he was to telephone a MOD or the assistant general manager or the general manager. He was also told that if he couldn't reach any of those people that he should write up a report and give it to the next AMOD or to a MOD the next morning.

Finally, Ms. Bathje also testified that AMODs have access to personnel files via the computer and access these files when they adjust grievances or issue discipline.

## **ANALYSIS AND CONCLUSIONS**

### **1. Supervisory Status**

As noted above, the first issue to be decided is whether this petition should be dismissed because the AMODs are supervisors within the meaning of the Act. Section 2(3) of the Act excludes "any individual employed as a

supervisor” from the Act’s definition of “employee,” thereby excluding supervisors from the Act’s protections. Section 2(11) of the Act defines a “supervisor” as: [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) has been interpreted to set forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861, 1867 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists, the Employer in this case. *Id.*; *Michigan Masonic Home*, 332 NLRB 1409 (2000). The Board has been careful not to construe the language of the statute relating to supervisory status too broadly, because once an individual is found to be a supervisor, that individual is denied the rights of employees protected by the Act. *St. Francis Medical Center West*, 323 NLRB 1046 (1997); *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel

vested with genuine management prerogatives should be considered supervisors and not straw bosses, lead men, set-up men and other minor supervisory employees. See *Chicago Metallic Corporation*, 273 NLRB 1677, 1688 (1985), affd. in relevant part 794 F.2d 527 (9<sup>th</sup> Cir. 1986). See also *Providence Hospital*, 320 NLRB 717, 725 (1996), citing *McCollough Environmental Services*, 306 NLRB 565 (1992). Where the evidence is in conflict or inconclusive with regard to particular indicia of supervisory status, the Board will not find supervisory status based on those indicia. *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The task here is to determine whether the Employer has satisfied its burden and proven that the AMODs are statutory supervisors by a “preponderance of credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). Therefore, any lack of evidence in the record is construed against the party asserting supervisory status. See *Willamette Industries, Inc.*, 336 NLRB 743 (2001).

The Employer contends that the AMODs are statutory supervisors because they substitute on a regular basis for MODs who are themselves supervisors, they adjust grievances, they discipline or effectively recommend discipline, they make effective hiring, promotion or bonus recommendations, they discipline employees or effectively recommend discipline and they supervise bus drivers and lot supervisors. However, Ms. Bathje’s testimony concerning what authority the AMODs possess was given in a conclusory manner and the record is virtually devoid of any evidence that corroborates her general testimony.

“[C]onclusionary statements made by a witness in their testimony without supporting evidence, does not establish supervisory authority. ” *Tree-Free Fiber Co*, 328 NLRB 389,393 (1999). This lack of corroboration is particularly significant in this case where the testimony regarding the actual duties and authority of the AMODs is insufficient to demonstrate supervisory status. Therefore, for the following reasons I find that the record evidence does not support the Employer’s position.

With respect to AMODS substituting for MODs, there is testimony in the record that when told to substitute for a MOD, at least one AMOD was given specific instructions that he was not being given authority to perform all of the MOD’s duties. The record evidence of actual substitutions was that AMODs substitute for MODS on an irregular basis, for short periods of time to cover while a MOD is in a meeting or takes an unscheduled day off. The frequency of such substitution was estimated at once a month. While there was testimony that AMODs substitute for MODs while the MOD is on vacation, no examples of such substitution were given. In any event, the Board has found that filling in on vacations and sporadically for other reasons is insufficient to confer supervisory status. *Frederick Steel Company*, 149 NLRB 5, 11 (1964) See also: *Webb Fuel Company*, 135 NLRB 309, 310-312. Cf. *United States Gypsum Company*, 114 NLRB 523, 526, 527; *Archer Mills, Inc.*, 115 NLRB 674, 676; *Sears, Roebuck & Company*, 112 NLRB 559, 562.

The Employer contends that the AMODs directing of bus flow between the terminal and the parking lots, requires the exercise of independent judgment.<sup>5</sup> However, the record evidence establishes that these traffic flow duties require only that the AMOD routinely ensure that the drivers follow predetermined schedules and that customers are transported to the parking lots within ten minutes of arriving at terminal departure areas. Even when AMODs occasionally transfer a bus or driver from one route to another these duties do not require the AMODs to exercise independent judgement. Rather the transfer is dictated by the Employer's policy that customers wait no more than ten minutes. Based on the record evidence, the direction of work the AMODs perform constitutes the routine direction of work of a repetitive and predictable nature. See *Tree-Free Fiber Co.*, supra (team leaders' assigning and prioritizing of work not supervisory where those decision were "routine responses to predictable, recurring work-assignment issues").

The Employer contends that the AMODs are supervisors because they utilize independent judgement when adjusting grievances. Again the Employer's testimony about this authority was conclusory and there no record evidence that any AMOD has ever actually adjusted either a Step 1 or Step 2 grievance. There is testimony by one of the Employer's own witnesses that he never adjusted grievances nor was involved in grievance handling while he was a AMOD. As noted above, where the evidence is in conflict or inclusive as it relates to the

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<sup>5</sup> The Employer admits though that while AMODs are responsible for maintaining traffic flow in the terminal area, lot supervisors are responsible for maintaining traffic flow in the parking lots. In addition, the AMODs earn only 15 cents per hour more than the lot supervisors whom the parties agree are non-supervisory employees.

exercise of a particular supervisory function, the Board will not find supervisory status based on that evidence. *Davis Memorial Goodwill Industries*, supra.

Accordingly I find that the Employer has not established that AMODs are involved in grievance handling or grievance adjustment.

The Employer also contends that AMODS effectively recommend various personnel actions such as hiring, retention after the probationary period, bonuses, and discipline. With respect to hiring, there is no testimony in the record that any AMOD has ever effectively recommended that an applicant be hired, although there is testimony that in the future, the Employer intends to somehow include AMODS in the hiring process. In evaluating evidence to determine whether an employee possesses sufficient authority to be excluded from the coverage of the Act the Board looks to actual duties performed, as opposed to speculation about those duties. “[W]hile it may be, as the employer asserts, that these positions will eventually possess supervisory authority or managerial discretion, our determination as to the proper unit placement at this time must be based on what the individuals filling these classifications actually do now as opposed to what they speculatively may be doing some time in the future (citation omitted)”. *Southwestern Bell Telephone Company*, 222 NLRB 407, 411 (1976). Here the record establishes that AMODs are not presently involved in the hiring process in any formal manner and the testimony about their future role is speculative.

With respect to the conclusory testimony that AMODs are responsible for recommending whether employees will be retained after their initial probationary

period, the record again fails to establish any specific instances where AMODs have been involved in making such recommendations. Instead the record evidence is that MODs are the ones actually involved in making these decisions. However, assuming *arguendo* that AMODs make these types of recommendations, the record does not establish that the Employer makes a decision on these issues without performing its own investigation. The law is well settled that although an individual can recommend that other employees be promoted, and that would essentially include a recommendation that an employee successfully completed a probationary period, that authority is insufficient unless their superiors are prepared to implement these recommendations without an independent investigation. *Chevron USA, INC. and Sailors Union of the Pacific, AFL-CIO*, 309 NLRB 59, 65 (1992).

With respect to the Employer's assertion that AMODs evaluate employees, or effectively recommend bonuses based on the evaluations that they complete, the record establishes that AMODs do not presently complete employee evaluations and have not done so since October 2005. There is no other evidence relating to AMODs' duties with respect to evaluating employees or effectively recommending bonuses.

The Employer also contends that the AMODs are supervisors because they are authorized to enforce company rules and discipline drivers who violate those rules. That testimony was again given in conclusory terms. There is record evidence that one AMOD<sup>6</sup> did complete employee corrective action notice forms.

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<sup>6</sup> It appears that all of the employee corrective action notices in evidence were prepared by Employer witness MOD Muharrem Ogez when he was a AMOD.



However the testimony establishes that those forms did not become effective until the MOD reviewed and signed off on them. Also, the documentary evidence establishes that these employee corrective action notices do no more than record an AMOD's routine observation that a driver has violated one of the Employer's rules. In fact, the overwhelming majority of the corrective action notices in the record document that the driver at issue did not stop at a stop sign on their route. A few of these employee corrective action notices in the record contain a notation that further discipline may be imposed if the employee re-offends. However, it is unclear at what point in this process a MOD becomes involved in the write-up, and it would appear from the face of the write-ups themselves that the notation about further discipline was added after the AMOD completed the top of the form, the Employer has not established that the AMODs administer discipline or effectively recommend it when they submit a corrective action notice form to a MOD. Furthermore, the record does not establish any logical or consistent connection between the number and nature of warnings that will add up to tangible discipline such as a suspension or termination. It is well established that merely issuing verbal reprimands is too minor a disciplinary function constitute supervisory authority. See *Beverly Manor Convalescent Centers*, 275 NLRB 943, 945 (1985). These employee corrective action notices appear to be no more than the equivalent of verbal reprimands. A AMOD's submission of these notices to a MOD does not constitute the exercise of supervisory authority in the absence of evidence that the notices have a tangible effect on an employee's job status and result in adverse action. See *Passavant Health Center*, 284 NLRB

887, 890 (write up or report must independently affect an employee's job status or tenure). Therefore the record evidence is insufficient to establish that AMODs discipline employees or effectively recommend their discipline.

The record evidence also establishes that AMODs are regularly used to investigate accidents or other incidents. The Employer appears to assert that because AMODs perform this function they exercise supervisory authority. Conducting these investigations requires the AMODs primarily to interview witnesses and then report the information back to the MOD or Assistant General Manager. In some situations, management provides a specific set of questions for the AMOD to use when interviewing witnesses. It is well settled that an employee who is required to gather information and merely report it to a superior does not exercise supervisory authority and these duties do not confer supervisory status. *Mt. Airy Psychiatric Center*, 253 NLRB 1003, 1008 (1981).

There is also some testimony that AMODs are involved in training and certifying drivers. However, that testimony is again conclusory. Moreover, the evidence as a whole actually establishes not only that whatever training AMODs provide is routine but also that they do not actually certify that an employee has been trained.

Finally, the Employer essentially contends that since it considers AMODs to be entry level managers and so informs them when hired, they must be considered supervisors. However, one AMOD testified that he was never told that the AMOD job was an entry level management position when he was hired. Moreover, the Board has held that employees who are being groomed for

supervisory posts are not supervisors, since future assignments are at best speculative. *Ramona's Mexican Food Products, Inc.*, 217 NLRB 867, 868 (1975).

The weight of the record evidence, establishes that AMODs spend the majority, if not all of their working time, performing non- supervisory duties. Accordingly I find that the evidence regarding the authority that AMODs may exercise does not establish supervisory status and the Employer has failed to meet its burden.

## **2. Confidential Status**

Alternatively the Employer argues that even if AMODs are not supervisors, they are confidential employees and that the petition should be dismissed because confidential employees are traditionally excluded from any bargaining unit.

A confidential employee “(1) assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations or (2) in the course of his duties, regularly has access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.” *Inland Steel Co.*, 308 NLRB 868, 872 (1992). “The Board's long-established test for determining whether an employee possesses confidential status is whether that employee ‘assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.’ ” *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956). “Under this definition it is insufficient that an employee

may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.” *Intermountain Elec. Ass’n.*, 277 NLRB 1, 4, (1985). As with supervisory status, a party asserting that an individual is a confidential employee bears the burden of proving that claim. *Crest Mark Packing Company*, 283 NLRB 999, 999 (1987).

According to the record evidence, Assistant General Manager Bathje is the person who effectuates policies that affect labor relations at the Employer’s DIA operation. There is no record evidence that the AMODs work closely with Ms. Bathje. Although there is some testimony that AMODs have usernames and passwords that can provide them with access to a computer that contains employee personnel records and other company information, that access is allowed solely so that a AMOD may check how many times an employee has been warned for a particular work related infraction. There is no evidence that the AMODs are otherwise involved in personnel or labor relations matters. Consequently, I find that the Employer has failed to establish that AMODs are confidential employees.

### **3. Conclusion**

Since I have concluded that AMODs are not supervisors or confidential employees, and no party has taken the position that if an election is ordered in

this case a unit of AMODs is not appropriate, I find that they constitute an appropriate unit for collective bargaining and I shall order an election among employees included in the unit described above.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.<sup>7</sup> Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been

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<sup>7</sup> Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by:

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS LOCAL 961<sup>8</sup>**

**LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **May 11, 2006**. No extension of time to file this list shall be

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<sup>8</sup> Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **May 18, 2006**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Dated at Denver, Colorado, this 4<sup>th</sup> day of May, 2006

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Michael W. Josserand, Acting Regional Director  
National Labor Relations Board  
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